reason to assume that out-of-state carriers electing a flat fee that is calibrated to the default weight-mile tax are likely to receive less value from their election than in-state carriers.

Second, the ATA mischaracterizes the state and federal holdings on which it relies. None of those cases has held that a party who is not required to pay, and does not pay, an optional flat fee is entitled to a presumption of discrimination.

The two cases the ATA discusses, *Trailer Marine Transport Corp. v. Vasquez*, 997 F.2d 1 (1st Cir. 1992), and *American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), certainly did not so rule. In *Trailer Marine Transport*, Puerto Rico imposed a $35 per year flat fee on truck trailers to fund a compulsory no-fault compensation plan for accident victims. The court analyzed the evidence to conclude that transient trailers paid 5 or 6 times as much per accident as permanent trailers. 977 F.2d at 10. This was virtually identical to the situation in *Scheiner*, where out-of-state truckers paid five times the tax rate as their Pennsylvania-based counterparts. The *Trailer Marine* Court acknowledged that "[d]eciding under the Commerce Clause precedents whether discrimination exists is heavily dependent upon the facts." *Id.* at 10. *ATA v. Secretary of Administration* similarly relied on actual evidence of discrimination to strike down Massachusetts' flat fees on transporting hazardous waste. 613 N.E.2d at 99, 102 (evidence included the State's concession that some interstate carriers paid the fees for all vehicles even though some vehicles never crossed the border at all and that some interstate vehicles carried hazardous waste only one time in Massachusetts but still had to pay the

annual fee, making the privilege more valuable to intrastate transporters).[1]

Third, none of the cases cited by the ATA presented situations where the only probative evidence showed just the opposite of what the ATA asks the Court to presume about Oregon's tax system. Here, the only evidence on point showed that out-of-state carriers fared better than their in-state counterparts. Wood chip carriers electing the flat fee paid higher per mile rates on average than did weight-mile taxpayers, while interstate sand and gravel carriers electing the flat fee saved more than 9.6 times per mile what their in-state counterparts saved in 1999 and roughly 2.67 times per mile what their in-state counterparts saved in 2000. App., 55a, 74a. As the trial court further found, the structure of Oregon's flat fees makes it unlikely they would affect carrier behavior. *Id.*, 58a.

Fourth, all of the ATA's cases were decided before the Court's decision in the *Michigan Public Serv. Comm'n* case last year. That decision leaves no doubt that discrimination must be proved in real dollars and cents and may not simply be presumed.

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[1] The ATA's other string cites pose no such conflict either as those cases also involved evidence of actual discrimination, *see, e.g. Commonwealth v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65, 67 (Ky. 1988) (where mandatory flat fees imposed a cost per mile between 1.5 cents and $150 for someone traveling under 10,000 and only .5 cents per mile or less for trucks traveling 40,000 miles or more and where evidence showed that out-of-state carriers invariably traveled far fewer than 10,000 miles on average and far fewer miles on average than Kentucky-based carriers, Kentucky flat fee, enacted as a retaliatory tax to the Pennsylvania fees struck down in *Scheiner*, held unconstitutional), or they were decided on other grounds, *see, e.g. American Trucking Ass'ns, Inc. v. State*, 556 N.W.2d 761, 765 (Wis. Ct. App. 1996) (court declares hazardous waste flat fees unconstitutional under the fair apportionment test and does no discrimination analysis).

B. The Court's decision in the Michigan case removes any supposed doubt about the need to prove actual discrimination in effect.

The cases cited by the ATA recognize that "whether discrimination exists is heavily dependent upon the facts," to use the words of the *Trailer Marine Transport* court. 977 F.2d at 10. However, to the extent there was any argument about the need to prove an actual discriminatory effect, the *Michigan* decision removed all possible doubt.

As the ATA and *amicus* The Chamber of Commerce assert here, the ATA argued in the *Michigan* case that it did "not need empirically to demonstrate the existence of a burdensome or discriminatory impact upon interstate trucking" caused by a $100 flat fee Michigan imposed on trucks engaged in point-to-point deliveries within the State. Rather, the ATA said that *Scheiner* "requires invalidation of the $100 flat fee, even in the absence of such proof." 125 S. Ct. at 2424-25. The Court disagreed, noting that the ATA proved in *Scheiner* that Pennsylvania's flat marker fee and flat axle tax fell five times more heavily on interstate trucks than local trucks. *Id.* at 2425. The Court concluded about the Michigan tax, "We lack convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities." *Id.* The same is true here.

The ATA and the Chamber of Commerce attempt to cabin the *Michigan* holding by arguing distinctions between Michigan's mandatory flat fee and Oregon's optional flat taxes. Chiefly, they say that Michigan's flat fee differs in that it taxes only local activity because it applies solely to point-to-point deliveries within the State. Of course, Oregon taxes only miles traveled within its borders. Neither the ATA nor the Chamber cites to any evidence in the record showing that Oregon's flat fees in practice regulary tax anything other than point-to-point deliveries in Oregon, such as by an out-of-state trucker picking up sand and gravel

somewhere in Oregon and delivering it someplace else in the State. The evidence was that these markets call for local activity because of the nature of the commodities involved. Log hauling trips, for example, typically run from 60 to 80 miles to allow truckers to run 3 to 5 trips per day from the logging site to the mill. App., 56a.

Putting aside the ATA's evidentiary problems, there is a bigger flaw in arguing this distinction. The ATA and the Chamber offer no doctrinal basis relating to the purposes of the dormant Commerce Clause for why the Court should require actual proof of discrimination in the case of Michigan's mandatory flat fee but presume discrimination in the case of Oregon's elective flat fee option. Certainly, dormant Commerce Clause analysis applies to the Michigan tax, which, while it attaches only to the local portion of a truck haul, nevertheless affects interstate commerce, as in instances where interstate carriers top off their loads with intrastate pickups and deliveries. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981). Had Michigan imposed a facially higher flat fee on out-of-state trucks, that would violate the Commerce Clause, regardless of the purely local nature of the tax. *See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99-100 (1994). Had the ATA shown empirically that Michigan's $100 fee significantly discourages interstate carriers from topping off or otherwise significantly deters interstate trade, the tax would have been unconstitutional as well. 125 S. Ct. at 2424. Contrary to the ATA's and the Chamber's suggestion, it seems far more likely as an intuitive matter that Michigan's universally applied $100 flat fee would fall more heavily on interstate carriers and therefore discourage them from "topping off" than that Oregon's optional flat fee, which is calibrated to collect what the average weight-mile taxpayer hauling each commodity pays, would discourage any trucker from hauling any commodity into, out of or through Oregon.

The empirical evidence in this case was all contrary to the ATA's proposed presumption of discrimination. Nothing about Oregon's optional flat fees offends core Commerce Clause principles. The fees do not interfere with the creation of a national trade area free from interference from the states, nor do they cause balkanization of the trucking market. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). Neither in-state nor out-of-state carriers consider the flat fee options in deciding whether to cross Oregon's borders. App., 56a-58a. Because carriers are required only to pay the weight-mile tax, the flat fees do not enforce an entry fee or otherwise erect a barrier around Oregon to keep Oregon goods in or interstate competitors out. *See Scheiner*, 483 U.S. at 284. Nor have the more than 50 years the flat fees have been in effect seen any retaliatory legislation enacted by other states, for the obvious reason that there is nothing to retaliate against. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-522 (1935).

The ATA and the Chamber also attempt to distinguish the Michigan tax by arguing that its purpose of defraying regulatory costs differs from Oregon's purpose of maintaining its highway system. However, an Oregon optional flat fee calibrated to the average number of miles run by haulers of specific commodities seems every bit as likely to be fair as a Michigan mandatory flat fee based on the average costs of regulating vehicular size and weight, of administering insurance requirements, and of applying safety standards. 125 S. Ct. at 2424.

Perhaps nothing undermines the asserted distinctions between *Michigan* and this case more than the fact that the Court relied on *Scheiner* to support the holding in *Michigan*. It would be difficult to find a flat tax that seems more obviously discriminatory than the border fees Pennsylvania imposed in *Scheiner*, particularly in light of the facts that the

fees bore no relationship to the services provided by the State and that the legislature enacted a simultaneous credit that effectively eliminated the axle fees for Pennsylvania-based carriers. 483 U.S. at 290. Yet, this Court found the tax discriminatory based on data showing that the fees imposed five times the burden on interstate trucks, *id.* at 286, and used that precedent to justify requiring proof of an actual discriminatory effect in the *Michigan* case. 125 S. Ct at 2425. If *Scheiner* left any doubt as to the quantum of proof needed to show discrimination, the *Michigan* decision has resolved that doubt.

C. The ATA failed to prove actual discrimination.

The ATA says that, even without a presumption of discrimination, it proved that the flat fees caused a discriminatory effect. Such invitations to review the well-supported factual findings of a trial court, as affirmed by the State's highest court on review, present no occasion to grant *certiorari*. The ATA's assertion seems all the more odd considering its only evidence of discrimination was presented through a witness whose testimony was rejected in its entirety because he was either reckless about the truth or deliberately lied to the trial court. App., 59a-60a.

Nothing about the trial court's conclusion, "When it comes right down to it, plaintiffs have presented *no* evidence of the difference, if any, between the actual taxes paid by in-state and out-of-state carriers," App., 69a, requires review by this Court. Nor is there any reason for the Court to review the trial court's conclusion that "evidence that would indicate that interstate commerce has been damaged was completely lacking."[2] In particular, there was no evidence showing that

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[2] While the Chamber of Commerce purports to worry that the small average underpayment found for log haulers and sand and gravel carriers might be important when the average profit per trucking mile is 3 cents, that worry is misplaced. First, there was no evidence showing that this

the flat fees encouraged truckers to concentrate their miles in Oregon or to avoid Oregon. *Id.*, 69a-71a.

The Oregon Supreme Court's opinion in this case did nothing more than require a Commerce Clause plaintiff to prove actual discrimination. Suggestions by the ATA and the Chamber that Oregon has somehow cleverly figured out a way to sidestep *Scheiner* and engage in undetected, purposeful discrimination cannot stand in light of the uncontroverted finding that the flat fees are designed to be revenue neutral as between weight-mile and flat fee payers – and those two categories are not even the same as out-of-state and in-state haulers.[3]

The ATA's arguments about discrimination offend two principles of federalism that have long animated this Court's Commerce Clause jurisprudence. The first is that states are given great leeway to enact tax systems; a plaintiff must show through clear and cogent evidence that a tax violates the Commerce Clause to prevail on such a claim. *Container Corp. of America v Franchise Tax Bd.*, 463 U.S. 159, 170 (1983). The second is that, when local

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was a benefit enjoyed by in-state carriers. Second, whatever the average profit margin might be for long-haul trucks, there was no evidence as to what log or sand and gravel carriers earn per mile. It would seem nearly impossible that the figure could be 3 cents. Because log trucks travel an average of roughly 45,000 miles per year (ER 16), that would make the average profit margin roughly $1,400. The profit would be worse for sand and gravel carriers, who average roughly 32,000 miles per year (*id.*) and would therefore earn less than $1,000 per year.

[3] The suggestion that this case provides a blueprint for other states to dodge *Scheiner* is far-fetched. Oregon's optional flat fees have been in effect in the same form since 1949, yet remain unique so far as we are aware. If Pennsylvania tried to change its flat axle fee as suggested by the Chamber, that would not make the tax constitutional if it caused out-of-state truckers to pay 500 percent more than in-state truckers any more than Oregon's tax would be constitutional had the ATA shown such an effect here.

parties pay the same tax as out-of-staters, as is the case here where the overwhelming majority of Oregon truckers pay the weight-mile tax, courts should be wary of striking down the tax when the State's own political processes would be expected to act as a check on any undue burden. *See Raymond Motor Co. v. Rice*, 431 U.S. 429, 447 (1978).

D. This case presents no fair apportionment issue.

In a final push to obtain review, the ATA urges that a tax system requiring trucks to pay a perfectly apportioned weight-mile tax, *see, Goldberg v. Sweet*, 488 U.S. at 264 (mileage-based taxes are by definition fairly apportioned), is somehow unfairly apportioned because the State offers a limited group of carriers especially burdened by record keeping to elect to be treated as an average hauler. This is equivalent to suggesting that state income taxes that allow taxpayers to elect the standard deduction instead of itemizing are unfairly apportioned and must violate the Commerce Clause. The ATA misunderstands fair apportionment.

As the Court said in *Jefferson Lines*, 514 U.S. at 184-85, fair apportionment is the "lineal descendant" of the prohibition against multiple taxation announced in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Fair apportionment uses the internal and external consistency tests to measure whether "each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 261. The internal consistency test asks whether, if all states enacted a tax identical to the challenged tax, multiple taxation would result. *Id.* The external consistency test asks whether the State has limited itself to taxing the in-state component of an interstate activity or instead has taxed extraterritorial values. *Id.* at 262.

The ATA does not contend that Oregon's tax violates the external consistency test. But the ATA misapplies the internal consistency test to argue that Oregon's tax violates this requirement. Boiled to its essence, the ATA argues that,

if it can hypothesize a fictional interstate trucker who might pay higher taxes than a fictional intrastate hauler, this violates fair apportionment.

The ATA is wrong. If every state duplicated Oregon's system, truckers would not be exposed to the risk of multiple taxation any more than purchasers of bus tickets were threatened with multiple taxation in *Jefferson Lines*. If every state had the same system as Oregon's, interstate truckers would be required to pay only for actual miles driven in each state. That is by definition fairly apportioned. *See Goldberg*, 488 U.S. at 264.

The ATA's real complaint is not that Oregon's system threatens interstate truckers with multiple taxation, but rather that some flat fee carriers were undertaxed in 2000 and that this benefit purportedly went to in-state carriers. Fair apportionment addresses problems of overtaxation that arise when a state seeks to tax more than its fair share of an interstate transaction. This creates a threat that a state that has a rightful claim to the share wrongly taken by the overreaching state will claim its fair share, resulting in double taxation that may smother interstate commerce. Fair apportionment does not address issues of undertaxation that may arise when a state does not collect everything it can from local commerce. Rather, this Court's discrimination precedents resolve issues raised by undertaxation of local commerce. This case thus presents no fair apportionment issue. Nor, as we have shown, does it present any genuine discrimination issue.

CONCLUSION

The Oregon Supreme Court properly rejected the ATA's invitation to ignore the evidence and indulge in a presumption of discrimination that the evidence contradicted. Instead, the court faithfully followed this Court's Commerce Clause discrimination and fair apportionment precedents to uphold a mileage-based tax that, for administrative savings

to both the taxpayers and the State, allows a small group of carriers to elect to be treated as average haulers. The petition for *certiorari* should be denied.

Respectfully submitted.

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APPENDIX

Appendix B

825.476 Carrier tax tables

MILEAGE TAX RATE TABLE "A"
January 1 through August 31, 2000

Declared Combined Weight Groups (Pounds)		Fee Rates Per Mile (Mills)
26,001	to 28,000	41.5
28,001	to 30,000	44.0
30,001	to 32,000	46.0
32,001	to 34,000	48.0
34,001	to 36,000	50.0
36,001	to 38,000	52.5
38,001	to 40,000	54.5
40,001	to 42,000	56.5
42,001	to 44,000	58.5
44,001	to 46,000	60.5
46,001	to 48,000	62.5
48,001	to 50,000	64.5
50,001	to 52,000	67.0
52,001	to 54,000	69.5
54,001	to 56,000	72.0
56,001	to 58,000	75.0
58,001	to 60,000	48.5
60,001	to 62,000	82.5
62,001	to 64,000	87.0
64,001	to 66,000	92.0
66,001	to 68,000	98.5
68,001	to 70,000	105.5
70,001	to 72,000	112.5
72,001	to 74,000	119.0
74,001	to 76,000	125.0
76,001	to 78,000	131.0
78,001	to 80,000	136.5

MILEAGE TAX RATE TABLE "A"

September 1 through December 31, 2000

Declared Combined Weight Groups (Pounds)		Fee Rates Per Mile (Mills)
26,001	to 28,000	36.4
28,001	to 30,000	38.6
30,001	to 32,000	40.3
32,001	to 34,000	42.1
34,001	to 36,000	43.8
36,001	to 38,000	46.0
38,001	to 40,000	47.8
40,001	to 42,000	49.5
42,001	to 44,000	51.3
44,001	to 46,000	53.0
46,001	to 48,000	54.8
48,001	to 50,000	56.6
50,001	to 52,000	58.7
52,001	to 54,000	60.9
54,001	to 56,000	63.1
56,001	to 58,000	65.8
58,001	to 60,000	68.8
60,001	to 62,000	72.3
62,001	to 64,000	76.3
64,001	to 66,000	80.7
66,001	to 68,000	86.4
68,001	to 70,000	92.5
70,001	to 72,000	98.6
72,001	to 74,000	104.3
74,001	to 76,000	109.6
76,001	to 78,000	114.9
78,001	to 80,000	119.7

(6)

Supreme Court U.S.
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No. 05-1177

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al,

Petitioners,

v.

OREGON DEPARTMENT OF TRANSPORTATION, et al,

Respondents.

Petition for Writ of Certiorari to the Oregon Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Oregon generally assesses a weight-mile tax on trucks using the State's highways. In certain circumstances, Oregon also allows truckers the option to pay a flat fee, in lieu of the weight-mile tax. The flat fees are designed and intended to be "revenue-neutral," as compared to the weight-mile tax. Does Oregon offend the dormant Commerce Clause by allowing truckers to pay these optional flat fees?[1]

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[1] Petitioners' statement of the "question presented" incorrectly asserts that Oregon has "imposed" the challenged flat fees on interstate commerce.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Oregon were petitioners American Trucking Associations, Inc.; CRST, Inc.; USF Reddaway Inc.; Kenneth E. Mansigh Trucking, Inc.; Veneer Chip Transport, Inc.; and respondents State of Oregon, Department of Transportation; Grace Crunican, in her capacity as Director of the Oregon Department of Transportation (Matthew Garrett is now the Director); and AAA Oregon/Idaho.

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STATEMENT OF THE CASE

In 1947, Oregon adopted a generally applicable weight-mile tax for heavy vehicles using the State's roads. Or. Laws 1947, ch. 467, § 17. That tax remains in place today. Or. Rev. Stat. §§ 825.474–825.476.

For almost as long, since 1949, Oregon also has allowed carriers of certain commodities—carriers that typically drive a significant number of off-road miles, for whom reporting under the weight-mile tax would be particularly burdensome—to pay a flat fee, in lieu of the weight-mile tax. *See* Or. Laws 1949, ch. 488, § 11. Flat-fee options are available to carriers of logs, sand and gravel, and wood chips. Or. Rev. Stat. § 825.480. The flat fees are available universally to carriers of those commodities.

The Oregon Legislative Assembly has required that the relative weight-mile and flat-fee rates be reviewed biennially and that appropriate adjustments be recommended to each regular biennial session of the Legislative Assembly. Or. Rev. Stat. § 825.482. From time-to-time, the Legislative Assembly has adjusted the relative weight-mile and flat-fee rates based on those biennial reviews.[2]

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[2] For example, the review prepared for the 1989 Legislative Assembly showed that log carriers who elected the flat fee paid $1,435,000 more than they would have paid under the weight-mile tax during that period. By 1993, incremental rate adjustments had reduced the overpayment to $566,532. Similarly, when the 1999 review found an underpayment by log carriers, the legislature adjusted the relative rates to close

In 2000, petitioners brought this action in state court, alleging (among other things) that the flat-fee options discriminate against interstate commerce. In the trial court, petitioners contended first that the flat-fee options are intentionally discriminatory. They argued that the Oregon Legislative Assembly used the flat-fee options to deliberately provide tax savings for certain taxpayers. The court found that to be petitioners' "weakest argument[,]" Pet. Cert. 63a (Trial Court opinion), and they abandoned it at the first stage of appeal. Thus, it is conclusively resolved in this case that the flat-fee options are not intended to provide tax savings for any taxpayers or groups of taxpayers.[3]

Petitioners also argued that the flat fees discriminate by pressuring businesses to concentrate their activities in Oregon to take advantage of the flat fees. But the trial court found "completely lacking" any "evidence that * * * interstate commerce has been damaged[.]" Pet.

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that gap. That adjustment was enacted in 1999—before the complaint in this case was filed—and took effect during 2000, the tax year at issue. Over time, carriers of each flat-fee-eligible commodity have marginally overpaid and marginally underpaid in given years, compared to what they would have paid under the weight-mile tax. *See* SER 19. ("SER" refers to the supplemental excerpt of record in the Oregon appellate courts.)

[3] While the Oregon Legislature's innocent intent is conclusively resolved by the proceedings below, petitioners nevertheless gratuitously insinuate that the tax rates are only "ostensibly" set to avoid tax savings by flat-fee taxpayers. Pet. Cert. 3. Petitioners' insinuations should be disregarded.

Cert. 69a. For example, "[t]here was no evidence of a single out-of-state carrier establishing a fleet or subsidiary to take advantage of flat fee rates[,]" or "of a single in-state carrier refusing to take a load out-of-state in order to concentrate its miles in Oregon." Pet. Cert. 70a. Ultimately, the trial court found it "unlikely that the flat fee option changes the business decisions of truckers." Pet. Cert. 58a.

The trial court also found that, during the year in question, of the three categories of flat-fee taxpayers, two underpaid and one overpaid, compared to what those groups of taxpayers would have paid under the weight-mile tax. Pet. Cert. 49a–53a. In each case, the discrepancy from revenue-neutrality was marginal, not more than about 15 percent. Pet. Cert. 75a.[4] Because the burden, if any, on interstate commerce was both small and uncertain, the trial court held it was incidental at most, and that it was warranted by the legitimate state interests the flat-fee options advance. Pet. Cert. 71a. Accordingly, the trial court sustained the flat-fee options.

Despite the trial court's findings, the Oregon Court of Appeals reversed. It held, as a matter of law, that the flat-fee options violate the internal-consistency principle. The Court of Appeals hypothesized a carrier that operated a

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[4] Petitioners purport to convert that discrepancy into a per-mile rate, which they then purport to compare with the average profit margin in the industry. Assuming that industry profit margins are a relevant yardstick by which to assess the constitutionality of state tax policy, petitioners fail to present the relevant comparison with profit margins in the low-mileage, flat-fee-eligible market segments.

specific number of miles during the tax year. Accepting that hypothesized premise, if Oregon's tax structure were universalized, the carrier's overall tax liability would be greater operating interstate than if it operated in one state only. Because the court was able to hypothesize such a carrier, it held the flat-fee options structurally invalid. *American Trucking Ass'ns, Inc. v. State of Oregon*, 90 P.3d 15, 22–23, 193 Or. App. 185 (2004). Indeed, on that theory, the Court of Appeals struck down even the flat-fee option under which flat-fee taxpayers *overpaid* during the year at issue. *Id.* at 25.

The Oregon Supreme Court rejected the Court of Appeals' injection of hypothetical facts into the analysis of internal consistency. The Oregon Supreme Court held that the challenged tax does not violate the internal-consistency principle because, structurally, it does not expose interstate commerce to multiple taxation. *American Trucking Ass'ns, Inc. v. State of Oregon*, 124 P.3d 1210, 1218, 339 Or. 554 (2005) ("*ATA v. Oregon*"). The court held further that petitioners failed to prove the challenged tax discriminates against interstate commerce. *Id.* at 1219–20. The Oregon Supreme Court therefore reversed the Court of Appeals decision and affirmed the decision of the trial court. *Id.* at 1220–21.

REASONS FOR DENYING REVIEW

Petitioners contend that this Court should grant review to consider three separate theories on which the challenged flat-fee options purportedly are invalid. Two of those theories assert that the structure of the tax—regardless of evidence—is unconstitutional. Those theories claim, first, that Oregon has run afoul of a general

rule against flat taxes on interstate commerce, and second, that the optional flat fees violate the internal-consistency requirement. Petitioners' third theory is that the record evidence establishes the alleged discriminatory effects of the flat fees. This brief addresses those issues as petitioners present them, taking up the internal consistency argument last.

I. No case of this Court or of any other court supports petitioners' claim of "structural discrimination" based solely on the "flat" character of the challenged fees, or their corollary claim that in these circumstances they should have been relieved of the requirement to prove discrimination.

Petitioners are unable to cite any decision of this Court, of any federal court of appeals, or of any state supreme court, holding that an optional flat fee, available in lieu of an apportioned tax to interstate and intrastate commerce alike, is "structurally discriminatory." The Oregon Supreme Court's rejection of that argument is in conflict with no case.

Petitioners nevertheless contend that *American Trucking Assn's, Inc. v. Scheiner*, 483 U.S. 266 (1987) and other cases of this Court compel the conclusion that the flat fees challenged in this case are structurally discriminatory. Therefore, they maintain, the Oregon Supreme Court erred by failing *conclusively to presume*—and instead *requiring proof* of—the alleged discriminatory effects of the tax.

In support of that proposition, petitioners rely on *Scheiner*'s statement that "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local

business than its out-of-state competitors is unquestionably discriminatory[.]" Pet Cert. 12 (quoting *Scheiner*, 483 U.S. at 296). *Scheiner*, in turn, quoted that passage from *Nippert v. City of Richmond*, 327 U.S. 416, 426 (1946).

But petitioners' causal theory of discrimination in this case is far more attenuated than in *Scheiner* or *Nippert*. As the quoted passage indicates, those cases involved challenges to flat taxes that were *imposed on* interstate commerce. Here, the challenged tax is not imposed on interstate commerce. Rather, petitioners allege discrimination resulting from an *optional* tax that they were not required to pay, and that they in fact did not pay.

Thus, insofar as the above precedents would support a rule that flat taxes *imposed on* interstate commerce constitute "structural discrimination"—and insofar as the rule would relieve a plaintiff of the burden to prove discriminatory effects in such cases—this case is not within that rule. Nothing in this Court's precedents required the Oregon Supreme Court to relieve petitioners of the burden to prove the alleged discriminatory effects from a flat fee paid optionally by others.

Petitioners also cite numerous state court and circuit court decisions that purportedly demonstrate a split of authority with the Oregon Supreme Court decision below. But each of those cases similarly involves a flat tax *imposed on* interstate commerce. This case is distinguishable on that ground. Just as the Oregon Supreme Court's decision does not conflict with this Court's precedents striking down flat taxes *imposed on* interstate commerce, so too the Oregon Supreme Court's decision